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No. 87-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CITY OF ARLINGTON, TEXAS,
Petitioner,

v.

LESTER M. BYRD, ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

JAY B. DOEGEY
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City of Arlington, Texas

QUESTIONS PRESENTED

1. Does the filing of a lien pursuant to a state paving assessment statute constitute a "taking" within the meaning of the Fifth Amendment to the Constitution of the United States?

2. May a property owner be awarded attorney fees pursuant to a 42 U.S.C. § 1983 cause of action when the owner has not attempted to obtain just compensation for an alleged "taking" through available state remedies?

3. May a property owner, who has prevailed solely on a state claim, allege a 42 U.S.C. § 1983 cause of action solely to support an award of attorneys fees pursuant to 42 U.S.C. § 1988?

LIST OF ALL PARTIES

The parties below were the City of Arlington, Texas; Lester M. and Wanda J. Byrd; Abram H. and Sandra L. Clark; Homer and Mary Ellis; James and Imogene Hayes; Walter S. Holtzclaw; Joel and Barbara Laxson; E. E. and Lois Rawdon; Elizabeth Sandlin; G. R. and Dovie Stephens; John Sullivan; Virgil E. and Betty S. Waldrop.

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Supreme Judicial District of Texas is reported at 713 S.W.2d 224, and is reproduced at "Appendix C" hereto.

JURISDICTION

The decision of the Supreme Court of Texas affirming the judgment of the court of appeals was entered on December 3, 1986. A copy of the judgment of the Supreme Court of Texas is reproduced at "Appendix B" hereto. A timely Motion for Rehearing was denied by the Supreme Court of Texas on January 28, 1987, and is reproduced at "Appendix A" hereto. The judgment of the Court of Appeals was entered on July 31, 1986. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

PROVISIONS INVOLVED

Amendment 5 to the Constitution of the United States provides in relevant part:

> * * * nor shall private property be taken for public use, without just compensation. * * *

Amendment 14, § 1, to the Constitution of the United States provides in relevant part:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified

> and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Article 1, § 17 of the Texas Constitution provides:

> Sec. 17. No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof.

Tex. Rev. Civ. Stat. Ann., article 1105b is set forth in pertinent part in "Appendix E" hereto.

STATEMENT OF THE CASE

1. BACKGROUND

In January of 1984, Petitioner ("City), following a public hearing, adopted a street paving assessment ordinance that assessed respondents in varying amounts for a portion of

the cost of improving a street abutting property owned by respondents. Pursuant to the adoption of the assessment ordinance, and in compliance with Tex. Rev. Civ. Stat. Ann., art. 1105b (hereinafter referred to as "Article 1105b"), liens were filed against respondents' properties for the amount of the assessments. The liens were thereafter released in May of 1985 after respondents provided proof to the City that their properties were exempt from the filing of said liens. Article 1105b, Sections 6 and 9.

2. JUDGMENT OF THE TRIAL COURT

Respondents filed suit in the 141st District Court of Tarrant County, Texas, seeking to declare the paving assessments to be null and void. The trial court, on August 21, 1985, declared the paving assessments to be null and void and further found that respondents were entitled to their attorneys fees in the amount of $42,000.00. The trial court refused to make any finding that the attorneys fees were awarded pursuant to 42 U.S.C. § 1988. Article 1105b does not provide for attorneys fees to a prevailing party.

3. THE COURT OF APPEALS

The Court of Appeals for the Second Court of Appeals District affirmed the decision of the trial court on July 31, 1986. The court specifically found that the assessment liens filed by the City amounted to an interference with the respondents title to their property and thus constituted a taking without just compensation. It further held that this taking provided the basis for the award of attorneys fees under 42 U.S.C. § 1988.

4. THE SUPREME COURT OF TEXAS

The Supreme Court of Texas, on December 3, 1986, refused the City's Application for Writ of Error with the

notation, No Reversible Error. The court further overruled the City's Motion for Rehearing of the Application for Writ of Error on January 28, 1987. The City has thus exhausted all available state remedies.

REVIEW OF THE JUDGMENT OF THE STATE COURT

The City objected to the offer of any evidence in the trial court regarding attorneys fees on the grounds that attorneys fees were not recoverable in this cause as a matter of law. The objections were overruled by the trial court. (Statement of Facts, pgs. 353, 358; Tr. 26). The City attacked the trial court's Findings of Fact and Conclusions of Law with respect to the award of attorneys fees. The City requested the following Conclusions of Law:

"No. 2. Plaintiff's failed to discharge their burden in showing any taking of Plaintiffs' properties in violation of Article 1, Section 17, of the Texas Constitution.

No. 13. Attorneys fees were awarded Plaintiffs pursuant to Title 42, Section 1988.

No. 14. Plaintiffs failed to prove any cause of action against Defendant under Title 42, Sections 1981, 1982, 1983, 1985 and 1986; there was evidence to show no liens existed against Plaintiff's properties at the time of trial."

The trial court refused to make any of the above requested findings. The trial court further refused to identify any theory upon which the award of attorneys fees was predicated. The court of appeals for the first time specified that attorneys fees were awarded pursuant to 42 U.S.C. § 1988 because the filing of the liens constituted a taking without just compensation. (Page C-9, infra). The finding of the court of appeals was subsequently attacked by the City in its

briefs. (Motion for Rehearing in Court of Appeals, Point of Error 3; Application for Writ of Error to Supreme Court of Texas, Point of Error 3; Motion for Rehearing on Application for Rehearing, Point of Error 1). The attorneys fees "taking" issue was also preserved through the amicus curiae briefs of the City of Midland, Texas, and the Texas Municipal League. All points of error were overruled by the appellate courts. (Pgs. A-1; B-1; C-1, infra.)

REASONS FOR GRANTING THE WRIT

I. The decision of the Supreme Court of Texas is in conflict the decision of this Court, other federal court decisions and with several highest court decisions of sister states regarding an important question of federal law.

The court of appeals, citing the Fifth and Fourteenth Amendments to the Constitution of the United States, specifically found that the filing of the City's assessment liens amounted to a taking of respondents' properties without just compensation. (Pg. C-p, infra). Such a conclusion is in direct conflict with the decision of this Court in *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F. Supp. 997 (D.C.D.-Ariz. 1973), *aff'd* 417 U.S. 901 (1974). In *Spielman-Fond*, it was held that the mere filing of a lien does not amount to a taking of a significant property interest. In the present case, the City complied with state statutory procedures requiring notice and hearing before the filing of the liens. Article 1105b, Section 9. Furthermore, said liens were released prior to the trial challenging the validity of the assessments. (S.F., p. 8).

Since the decision in *Spielman-Fond*, other federal courts have followed the decision in that case holding that the filing of a lien does not constitute the deprivation of any

"significant" property interest and that prior notice and opportunity for a hearing before filing such a lien was not necessary to comply with due process. *Evers v. County of Custer,* 745 F.2d 1196 (9th Cir. 1984); *Northwest Homes of Chehalis, Inc. v. Weyerhauser Co.,* 526 F.2d 505 (9th Cir. 1975); *B & P Development v. Walker,* 420 F. Supp. 704 (D.C.W.D.-Pa. 1976); *In re Thomas A. Cary, Inc.,* 412 F. Supp. 667 (D.C.E.D.-Va. 1976); *In re The Oronoka,* 393 F. Supp. 1311 (D.C.D.-Me. 1975); *Brook-Hollow Associates v. J. E. Greene, Inc.,* 389 F. Supp. 1322 (D.C.D.-Conn. 1975); *Ruocco v. Brinker,* 380 F. Supp. 432 (D.C.S.D.-Fla. 1974). Furthermore, since *Spielman-Fond* was summarily affirmed by the United States Supreme Court, many of the above listed courts have held that *Spielman-Fond* is controlling.

The opinion of the court of appeals as affirmed by the Texas Supreme Court is further in conflict with the decisions of the Supreme Courts of several of Texas' sister states following *Spielman-Fond.* Kansas in *Cook v. City of Interprise,* 233 Kan. 1039, 666 P.2d 1197 (1983); Oklahoma in *Mobile Components, Inc. v. Layon,* 623 P.2d 591 (Okl. 1980); Arizona in *First Recreation Corp. v. Amoroso,* 113 Ariz. 572, 558 P.2d 917 (1976); Arkansas in *South Central District of the Pentacostal Church of God v. Bruce Rogers Co.,* 269 Ark. 130, 599 S.W.2d 702 (1980); Colorado in *Bankers Trust Co. v. El Paso Pre-cast Co.,* 192 Col. 468, 560 P.2d 457 (1977); Georgia in *Tucker Door & Trim Corp. v. Fifteenth Street Co.,* 235 Ga. 727, 221 S.E.2d 433 (1975); Iowa in *Keith Young & Sons Construction Co. v. Victor Senior Citizens Housing, Inc.,* 262 N.W.2d 554 (Iowa 1978); Missouri in *Home Building Corp. v. Ventura Corp.,* 568 S.W.2d 769 (Mo. 1978); Montana in *Bustell v. Bustell,* 170 Mont. 457, 555 P.2d 722 (1976), *appeal dism'd* 430 U.S. 925 (1977); and Tennessee in *Silverman v. Gossett,* 553 S.W.2d 581 (Tenn. 1977). Also

following *Spielman-Fond* are lower appellate courts in Washington in *Lake Stevens Sewer District, Snohomish Co. v. Village Homes, Inc.*, 18 Wash. App. 165, 566 P.2d 1256 (1977); Colorado in *North Washington Water and Sanitation District v. Majestic Savings & Loan Association*, 42 Colo. App. 158, 594 P.2d 599 (1979); Oregon in *Wright v. Associates Financial Services Co. of Oregon, Inc.*, 59 Or. App. 688, 651 P.2d 1368 (1982); Minnesota in *Boline v. Doty*, 345 N.W.2d 285 (Minn. App. 1984); Michigan in *Williams & Works, Inc. v. Springfield Corp.*, 81 Mich. App. 355, 265 N.W.2d 328 (1978) *rev'd on other grounds*, 408 Mich. 732, 293 N.W.2d 304 (1979); New York in *Carl A. Morse, Inc. v. Rentar Industrial Development Corp.*, 56 A.D.2d 30, 391 N.Y.S.2d 425 (1977) *aff'd* 404 N.Y.S.2d 343, *appeal dism'd* 439 U.S. 804; and Louisiana in *C. J. Richard Lumber Co. v. Melancon*, 476 So.2d 1018 (La. App. 3 Cir. 1985).

Spielman-Fond, and the line of cases following it, found that the mere filing of a lien did not constitute an unconstitutional taking of property. There is, therefore, no authority to support the court of appeals opinion that the filing of the assessment liens by the City constituted a taking without just compensation in violation of the Fifth and Fourteenth Amendments. Thus, the City did not invade any constitutional property rights of respondents such as would give rise to damages and attorneys fees pursuant to 42 U.S.C. § 1983, 1988. Because of the conflict of the decision of the Texas Supreme Court with those decisions of this Court and the highest courts of several sister states, this Court should issue a writ of certiorari to clarify and settle the dispute as to the proper rule of law.

II. The decision of the Supreme Court of Texas on an important question of federal law is in conflict with a decision of this Court.

The taking claim advanced by the court of appeals as affirmed by the supreme court is not ripe for the reasons that respondents did not seek just compensation through available state procedures. Respondents have neither plead nor proven any damages suffered because of the alleged taking. Further, the court of appeals made no finding that respondents were monetarily damaged because of the alleged taking. Respondents alleged the taking merely to serve as a vehicle to support attorneys fees pursuant to 42 U.S.C. § 1988 (which was not plead).

In the teachings of this Court, such a taking claim is not ripe until respondents have sought just compensation through available state procedures. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985). Specifically, this Court found that a property owner has not suffered a violation of the Fifth Amendment until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the state for obtaining just compensation. "Respondent has not shown that the inverse condemnation procedure unavailable or inadequate and until it has utilized that procedure, its taking claim is premature." *Id* at 3122.

The State of Texas has a procedure available to property owners alleging a governmental land use regulatory taking. Article 1, § 17, of the Texas Constitution provides the inverse condemnation procedure required in *Williamson County.* This section of the Texas Constitution has been, and may be utilized by property owners alleging a taking without just compensation. *City of Austin v. Teague,* 570 S.W.2d 389 (Tex. 1978).

As has been noted, the award of attorneys fees by the court of appeals was predicated on respondents 42 U.S.C. § 1983 claim. The court of appeals further found that a Fifth Amendment taking violation occurred when liens were filed by the City against respondents' properties. In *Williamson County,* the Court stated that

> "... because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right, therefore, requires that a property owner utilize procedures for obtaining compensation before bringing a Section 1983 action."

Id at 3121, fn. 13. The court of appeals, therefore, erred in not following the rule of this Court by finding a Fifth Amendment violation without the benefit of incorporating the state's inverse condemnation procedure. The award of attorneys fees, predicated on the 42 U.S.C. § 1983 cause of action, therefore, was improper. It is, therefore, imperative that this Court grant a writ of certiorari so that *Williamson County* may be applied to the facts of this present case.

III. The decision of the Supreme Court of Texas on an important question of federal law conflicts with a decision of the Supreme Court of South Carolina

A conflict exists between the Supreme Court of Texas and the Supreme Court of South Carolina over the interpretation of a federal civil rights statute. The Supreme Court of South Carolina, in interpreting the availability of relief in state courts pursuant to 42 U.S.C. § 1983 has said:

> "Section 1983 does not provide for any substantial rights; it is remedial. State remedies for asserting rights may not be circumvented by invoking Section 1983. It may reasonably be inferred that the

> sole reason for alleging Section 1983 was to justify the allowance of counsel fees. We do not believe this was contemplated by Congress when it enacted Sections 1983 and 1988."

Spencer v. South Carolina Tax Commission, 281 S.C. 492, 316 S.E.2d 386, 389 (S.C. 1984). *Spencer* was affirmed by this Court. *Spencer v. South Carolina Tax Commission,* 471 U. S. 82 (1985). This Court has further denied an award of attorneys fees under 42 U.S.C. § 1988 where the Plaintiffs prevailed under an exclusive statutory remedy. *Smith v. Robinson,* 468 U. S. 992 (1984).

In its decision below, the court of appeals cited *Maine v. Thiboutot,* 448 U.S. 1 (1980) for the proposition that the filing of a lien constituted the basis of the award of attorneys fees. *Thiboutot,* however, holds only that attorneys fees are available to prevailing parties in an action to enforce 42 U.S.C. § 1983. *Thiboutot* does not in any way stand for the proposition that the mere filing of a lien may constitute a taking; it merely provides that 42 U.S.C. 1988 attorneys fees may be awarded in state court to prevailing parties enforcing a cause of action under 42 U.S.C. § 1983. Not cited by the court of appeals is *Parratt v. Taylor,* 451 U.S. 527 (1981). In *Parratt,* this Court held that claims alleging violations of Fourteenth Amendment due process rights are not to be heard in federal court if there exists in state law an adequate post-deprivation remedy.

In the present case, state law provided the exclusive basis for which relief was granted to respondents. Article 1105b. No remedy was provided respondents by the trial court or court of appeals that was not specifically available under state grounds. Like *Spencer,* it may reasonably be inferred that 42 U.S.C. § 1983 was alleged merely to support the award of attorneys fees. There was no proof in the trial

court of any violation, under color of state law, of a federally protected right, such as was violated in *Thiboutot.* Moreover, the mere filing of a lien, as has been previously discussed, does not constitute a taking that gives rise to a federal civil rights claim.

The Texas Supreme Court's view cannot be reconciled with the decisions of this Court or the cited decision of the South Carolina Supreme Court. This Court should, therefore, grant a writ of certiorari to address this conflict.

CONCLUSION

Because of the manifest conflict between the holding of the Texas Supreme Court in this case with (1) the holding of this Court in *Spielman-Fond,* supra at 6; (2) the holding of this Court in *Williamson County,* supra at 9; and (3) the holding of the Supreme Court of South Carolina in *Spencer,* supra at 10; and because the Texas Supreme Court has improperly determined that the filing of a lien constitutes a taking without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, this Court should grant a writ of certiorari to resolve these conflicts and settle the pending issue of federal law.

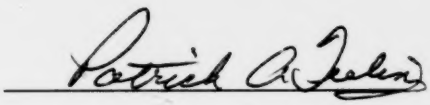
Respectfully submitted,

JAY DOEGEY, City Attorney
JOHN C. STEWART
PATRICK A. TEELING

By Patrick A. Teeling
Attorneys for Petitioner
City of Arlington, Texas

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS has been mailed by certified mail, return receipt requested, on this the 28th day of April, 1987, to Mr. William R. Brown, 715-B Ryan Plaza Drive, Arlington, Texas 76011, and Mr. Toby R. Goodman, 2005 East Lamar Boulevard, Suite 100, Arlington, Texas 76006, Attorneys for Petitioner.



APPENDIX A

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

January 28, 1987

Mr. John C. Stewart
Office of the City Attorney
Jay B. Doegey, City Attorney
P.O. Box 231
Arlington, TX 76010

Mr. William R. Brown
Kerry, Harrison, Brown, Lewis
Steck & Forderhase
715-B Ryan Plaza Drive
Arlington, TX 76011

Mr. Toby R. Goodman
Goodman, Wells, McClaren & Cade
2005 East Lamar Boulevard
Suite 100
Arlington, TX 76006

RE: Case No. C-5800

STYLE: CITY OR ARLINGTON, TEXAS
v. LESTER M. BYRD ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By Blanca E. Morin
Deputy

APPENDIX B

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

December 3, 1986

Mr. John C. Stewart
Office of the City Attorney
Jay B. Doegey, City Attorney
P.O. Box 231
Arlington, TX 76010

Mr. William R. Brown
Kerry, Harrison, Brown, Lewis
Steck & Forderhase
715-B Ryan Plaza Drive
Arlington, TX 76011

Mr. Toby R. Goodman
Goodman, Wells, McClaren & Cade
2005 East Lamar Boulevard
Suite 100
Arlington, TX 76006

RE: Case No. C-5800

STYLE: CITY OR ARLINGTON, TEXAS
v. LESTER M. BYRD ET AL.

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk

By Blanca E. Morin
Deputy

APPENDIX C

NO. 2-85-230-CV

COURT OF APPEALS
FOR THE
SECOND COURT OF APPEALS DISTRICT

CITY OF ARLINGTON, TEXAS

vs.

LESTER M. BYRD, *et al.*

From the 141st District Court
Tarrant County (141-82577-84)
July 31, 1986
Opinion by Justice Farris
(P)

JUDGMENT

This cause came on to be heard on the transcript of the record and the same having been reviewed it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

It is further ordered that appellant, City of Arlington, Texas pay all costs in this behalf expended, for which let execution issue, and that this decision be certified for observance.

D F F

AFFIRM.28

NO. 2-85-230-CV

IN THE COURT OF APPEALS
FOR THE
SECOND COURT OF APPEALS DISTRICT

CITY OF ARLINGTON, TEXAS
Appellant

vs.

LESTER M. BYRD, and WANDA J. BYRD,
ABRAM H. CLARK and SANDRA L. CLARK,
HOMER ELLIS and MARY ELLIS,
JAMES HAYES and IMOGENE HAYES,
WALTER S. HOLTZCLAW, JOEL LAXSON and BARBARA LAXSON,
E. E. RAWDON and LOIS RAWDON,
ELIZABETH SANDLIN, G. R. STEPHENS and DOVIE STEPHENS,
JOHN SULLIVAN, VIRGIL E. WALDROP and BETTY S. WALDROP
Appellees

FROM THE 141ST DISTRICT COURT
OF TARRANT COUNTY

OPINION

The City of Arlington appeals a judgment declaring void an ordinance that assessed the appellees a portion of the cost of road improvements.

We affirm.

Appellees own and reside on eleven tracts adjoining Pleasant Ridge Road in the City of Arlington. Pleasant Ridge Road was a two-lane street, bordered by drainage ditches, without curbing or sidewalks. After the passage of the ordinance in question Pleasant Ridge Road was widened to a four-lane divided street with storm sewers, curbing and sidewalks. Before passage of the ordinance, the City determined

that the improvements would produce an estimated increase in value to the properties of $50.00 per front foot along Pleasant Ridge Road. It is stipulated that the appellees were assessed at the rate of either $22.00 or $39.77 per front foot and that the appellees' assessments ranged from $472.78 to $11,931.00.

After trial before the court, the trial court entered judgment for the appellees declaring the ordinance void and awarding the appellees attorneys' fees and costs. In support of the judgment, the trial court made findings of fact that there was no evidence of special benefit accruing to the appellees either at the City Council hearing or the trial and concluded that the appellees receive no special benefit as a result of the improvements to Pleasant Ridge Road.

TEX. REV. CIV. STAT. ANN. art. 1105b (Vernon 1963) and (Vernon Pamp. Supp. 1986) controls the City's assessment ordinance. Section 9 of the article prohibits assessing any abutting property owner in excess of the special benefit to the property and the enhanced value thereof resulting from the improvements. The City must determine special benefit at a hearing conducted according to the provisions of art. 1105b. We are called upon to review the validity of the City's determination. We begin with the Texas Supreme Court's definition of special benefit:

> [T]he term "special benefit" connotes an enhancement more localized than a general improvement in community welfare, but not necessarily unique to a given piece of property. A special benefit is one going beyond the general benefit supposed to diffuse itself from the improvement through the municipality.

Haynes v. City of Abilene, 659 S.W.2d 638, 641-42 (Tex. 1983). With regards to the standard of review to be employed, the *Haynes* court stated:

> There is a strong presumption in favor of the validity of municipal legislative action and the burden of proof is on the parties seeking to invalidate

> it. *City of Pharr v. Tippitt*, 616 S.W.2d 173, 176 (Tex. 1981). Our review of the City's special assessment is governed by the substantial evidence rule. *City of Houston v. Blackbird*, 394 S.W.2d 159, 163 (Tex. 1965). Substantial evidence need not be much evidence, and although 'substantial' means more than a mere scintilla, it is less than is required to sustain a verdict being attacked as against the great weight and preponderance of the evidence. Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 S.W.L.J. 239, 241 (1969).

Id. at 640.

In its first point of error, the City complains that there was substantial evidence to support its findings that each of the appellees' properties would be specially benefitted by the improvements in an amount equal to or greater than the assessments. If there is substantial evidence to support the City's findings of special benefit, then the City's ordinance must stand. *See Firemen's & Policemen's Civ. Serv. v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984).

Before discussing the City's point of error, we must determine what evidence, if any, the trial court was entitled to consider in determining the validity of the City's ordinance. The evidence presented to the trial court was of two types, evidence of what the City Council considered in reaching its determination and evidence of matters not presented to the City Council which contradicted the City's determination of special benefit; e.g., property appraisals and evidence of detriment to property values resulting from the improvements. The City contends that the trial court violates the substantial evidence rule if it bases its decision to void the assessment on any evidence not first presented to the City during the hearing procedure preceeding the City's determination. The City contends that any determination of fact by the court amounts to trial de novo, not permitted under the substantial evidence rule. The Supreme Court recognized that the difficulty in applying the substantial evidence rule

arises from the dual role trial courts must play. "On one hand, the court must hear and consider evidence to determine whether reasonable support for the administrative order exists. On the other hand, the agency itself is the primary fact-finding body, and the question to be determined by the trial court is strictly one of law." *Id.* at 956.

In the *City of Houston v. Blackbird,* 394 S.W.2d 159, 164-65, (Tex. 1965), a case involving the validity of a similar assessment ordinance, the Supreme Court recognized the propriety of the courts considering not only the testimony of the evidence considered by the city council, but also evidence of occurrences subsequent to the city's determination when the proof of the subsequent occurrence was the best evidence available of what the city council should have known would occur at the time of its determination.

As we have noted, the trial court considered the testimony and documentary evidence of the evidence presented to the City Council on special benefit as well as other evidence not available to the City Council. We do not agree with the City's contention that it is improper for the court to consider evidence merely because that evidence was not available to the City in its determination; however, the evidence of matters considered by the City Council is sufficient for our determination of the appellant's first point of error.

We hold that there was not substantial evidence presented to the City Council to support its finding that the special benefit to the appellees' properties equaled or exceeded the assessment. At the trial of this cause the parties introduced into evidence the documents considered by the City in its determination of the special assessment of the Pleasant Ridge Road property owners and the transcript of the minutes of the City Council's hearing. The documents show that the City's determination of special benefit was based upon speculation as to future use of the appellees' properties.

At the trial of this cause, City employees testified that the special benefit to the adjoining landowners was estimated on an anticipated increase in value that assumed that the appellees' properties were unimproved real estate when, in fact, each of the appellees' properties was improved, single-family residential property. Rickey Tankersley, the City's appraiser, testified that his estimates of value were based upon a change of use of the properties from single-family residences to a more dense residential development even though the properties were presently zoned single-family residences. Tankersley was unable to testify when, if ever, the land use of the appellees' properties would change because his analysis was geared to vacant land only.

A memo from the City's Director of Public Works to the Mayor and City Council, in contrasting the Pleasant Ridge Road improvements with those on another street, referred to the possibility of sub-division or redevelopment of the Pleasant Ridge Road property "giving these properties the potential to be used for something other than its[sic] present use." A memo from the Assistant Director of Utilities/Finance to the Director of Public Works stated that the "transitional character of the market area" was given consideration in determining the enhancement. A memo from the Property Management Department of the City of Arlington to the Assistant City Engineer stated that the improvements would "have a significant influence on future land uses and values in the area." The Property Management Department memo went on to acknowledge that the property was currently zoned residential and that the City master plan called for low residential uses, but stated that the proposed street improvements and the increase in traffic would not create a conducive environment for single-family residential development but for more dense development, thus increasing the value and that without the proposed improvement to the street, it was unlikely the changes would occur.

Speculation about substantial benefit to accrue to property owners in the indefinite future is not substantial

evidence to support a special assessment. *Page v. City of Lockhart,* 397 S.W.2d 113, 120 (Tex.Civ.App. — Austin 1965, no writ). We overrule appellant's first point of error.

In its second point of error, the City complains, "The plaintiffs waived their right to complain of the actions of the Arlington City Council by failing to attend the public hearing regarding the assessments and failing to present any evidence thereat." In its findings of fact and conclusions of law, the trial court found that appellees did not waive their right to complain of the finding of special benefit.

In support of its contention, the City cites *Cook v. City of Addison,* 656 S.W.2d 650 (Tex.App. — Dallas 1983, writ ref'd n.r.e.). In the *Cook* case, abutting property owners appealed summary judgment for the city. In affirming the trial court judgment, the Court of Appeals found that the assessment was not arbitrary and that there was sufficient evidence before the city council to sustain the assessment. *Id.* at 659. One of the abutting property owners sought to appeal a mistaken calculation of his front footage abutting the road to be improved. No attempt was made to correct this error in calculation during the city council's hearing. The court in *Cook* held that the property owner waived his right to complain of the error in calculation when he failed to bring that matter before the city council at the art. 1105b sec. 9 hearing. The question of waiver before this court is unlike the question of waiver faced by the court in *Cook* because the appellees challenge the validity of the ordinance and not merely an error in calculation. We hold that the appellees did not waive their rights to bring this suit by their failure to appear at the City Council hearing and offer evidence in opposition to the assessment. The Supreme Court in *City of Houston v. Blackbird,* 394 S.W.2d at 164, noted that not all of the plaintiffs were present or represented by counsel at the city council hearing. Despite the failure of some of the plaintiffs to contest the assessment at the city council hearing, the Supreme Court affirmed judgment for the plaintiffs and, relying upon evidence adduced at the trial court, held that the assessments were based upon an arbitrary determination of benefits and were void. Appellant's second point of error is overruled.

In its third and final point of error the City contends that the trial court erred in awarding attorney's fees to appellees. Appellees' petition included a request for $115,000.00 in fees and the City filed no special exceptions thereto. The court awarded appellees a total of $33,500.00 in attorneys' fees; however, the City argues that the trial court was without the authority to include any such award in the judgment.

Appellees' original petition alleged violations by the City of 42 U.S.C. secs. 1981-86 (1981), claiming that the assessment liens constituted a taking of private property without just compensation in violation of the fifth and fourteenth amendments to the U.S. Constitution. The City maintains, however, that a city is not a proper defendant in a sec. 1983 claim and that appellees are not entitled to attorneys' fees because appellees did not plead 42 U.S.C. sec. 1988 (1981) and the State statute does not provide for such an award.

Initially, we hold that appellant's actions did bring it within secs. 1981-86. Municipalities are "persons" within the meaning of the statute, *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 2038, 56 L.Ed.2d 611 (1978), and may be held liable for damages for constitutional violations flowing from their legislative activities, even in the absence of bad faith. *Owen v. City of Independence*, 445 U.S. 622, 647, 100 S.Ct. 1398, 1415-16, 63 L.Ed. 2d 673 (1980). *See also City of Houston v. Glenshannon Townhouse*, 607 S.W.2d 930, 935 (Tex.Civ.App. — Houston [1st Dist.] 1980, no writ). We now turn to sec. 1988.

42 U.S.C. sec. 1988 (1981) provides that a court, "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" in actions to enforce secs. 1981-86. When sec. 1983 actions are brought in state courts, sec. 1988 is available as a remedy because the Supreme Court has held that sec. 1988 is an integral part of Congress' scheme to encourage compliance with sec. 1983. *Maine v. Thiboutot*, 448 U.S. 1, 11, 100 S.Ct. 2502, 2507, 65 L.Ed.2d 555 (1980); *see* Wolf, *Pendent Jurisdiction, Multi-Claim Litigation, and the 1976 Civil Rights Attorney's Fees Awards Act*, 2 W. New Eng.L.Rev. 193, 236 (1979) (state courts have

concurrent jurisdiction over federal claims, so "it follows that they also have the power to apply all federal remedial statutes which may assist the state court in granting full relief"); *see also City of Amarillo v. Langley,* 651 S.W.2d 906, 915 (Tex.Civ.App. — Amarillo 1983, no writ).

Appellees' petition alleged that the assessment liens filed by the City amounted to an interference with their title to the property and constituted a taking without just compensation.[1] The trial judge filed a conclusion of law upholding the appellees' contention. This constitutional violation provides a basis for the award of attorney's fees under 42 U.S.C. sec. 1988. *See Maine v. Thiboutot,* 448 U.S. at 9. We hold the trial court had the authority to award attorneys' fees to appellees and overrule the City's third point of error.

The judgment of the trial court is affirmed.

DAVID F. FARRIS
David F. Farris,
Justice

PANEL A
FENDER, C.J.; HOPKINS AND FARRIS, JJ.
PUBLISH

JUL 31 1986

[1] The just compensation clause of the fifth amendment was made applicable to the states through the fourteenth amendment in *Chicago, B. & O. R. Co. v. City of Chicago,* 166 U.S. 226, 236, 17 S.Ct. 581, 584, 41 L.Ed. 979 (1987). The clause provides: "... nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

APPENDIX D

NO. 141-82577-84

LESTER M. BYRD, *et al*

vs.

CITY OF ARLINGTON, TEXAS

IN THE DISTRICT COURT
141ST JUDICIAL DISTRICT
TARRANT COUNTY, TEXAS

FINAL JUDGMENT

On the 3rd day of June, 1985, came on to be heard the above entitled and numbered cause which continued day to day thereafter until conclusion.

The Plaintiffs appeared in person and by and through their attorney of record.

The Defendant, City of Arlington, appeared by and through its attorney of record.

Plaintiffs and Defendant announced ready for trial and the Court proceeded to hear evidence as to all matters of fact and law.

The Court, after hearing the evidence and the arguments of counsel, finds that there was no evidence presented to the Arlington City Council at the public hearing on November 22, 1983, as to any special benefits that would result to Plaintiffs or their properties as a result of the improvement of Pleasant Ridge Road in Arlington, Texas and that Defendant's Ordinance numbered 84-27 entitled "AN ORDINANCE CLOSING HEARING AND LEVYING ASSESSMENTS FOR A PORTION OF THE COST OF IMPROVING A PORTION OF PLEASANT RIDGE ROAD FROM LITTLE ROAD TO KELLY ELLIOTT ROAD, FIXING A CHARGE AND LIEN AGAINST ABUTTING PROPERTY AND ITS OWNERS; PROVIDING FOR THE TIME AND MANNER SUCH ASSESSMENTS BECOME

DUE AND PAYABLE, THE RATE OF INTEREST, AND THE CONDITIONS OF DEFAULT; DIRECTING THE ISSUANCE OF CERTIFICATES OF SPECIAL ASSESSMENT; AND DECLARING AN EFFECTIVE DATE" which was presented and given first reading on January 31st, 1984, is therefore null and void and without force or effect.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that all special assessments or liens levied or filed against Plaintiffs or their properties as a result of the enactment of the aforesaid Ordinance be and are hereby declared null and void.

The Court further considered Plaintiffs request for attorney's fees and finds that Plaintiffs are entitled to reasonable attorneys fees which the Court finds to be $33,500.00 through the trial of this cause, an additional sum of $5,000.00 if appealed to the Court of Appeals, and an additional sum of $3,500.00 if appealed to the Texas Supreme Court. The Court further finds that judgment should be rendered in favor of Toby R. Goodman, Plaintiff's Attorney for such an amount.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Toby R. Goodman be and is hereby granted judgment against Defendant, City of Arlington, in the amount of $33,500.00 plus interest at the rate of 10 per cent per annum until paid, plus an additional sum of $5,000.00 if appealed to the Court of Appeals and the additional sum of $3,500.00 if appealed to the Texas Supreme Court.

All costs of court expended or incurred in this cause are hereby adjudged against, Defendant, City of Arlington. All writs and processes for the enforcement or collection of this judgment or costs of court may issue as necessary.

Signed this _____ day of _____, 1985.

_____
Honorable James E. Wright
Judge Presiding

APPROVED AS TO FORM

REMINGTON & GOODMAN
First City Tower, Suite 700
201 E. Abram Street
Arlington, Texas 76010
817-460-8171

TOBY GOODMAN
Toby R. Goodman
Bar Code No: 08159500
Attorney for Plaintiffs

APPENDIX E

ART. 1105b

Street improvements and assessments in cities having more than 1000 inhabitants

Power to make improvements; boundary streets

Section 1. (a) That cities, towns and villages incorporated under either general or special law, including those operating under special charter, or amendments or charter adopted pursuant to the Home Rule provisions of the Constitution, shall have power to cause to be improved, any highway, within their limits by filling, grading, raising, paving, repaving, and repairing in a permanent manner, and by constructing, reconstructing, repairing and realigning curbs, gutters and sidewalks, and by widening, narrowing and straightening, and by constructing appurtenances and incidentals to any of such improvements, including drains and culverts, which power shall include that of causing to be made any one or more of the kinds or classes of improvements herein named or any combination thereof, or of parts thereof.

* * * * * * * * *

(b) Any assessment against abutting property shall be a first and prior lien thereon from the date improvements are ordered, and shall be a personal liability and charge against the true owners of such property at said date, whether named or not. The governing body shall have power to cause to be issued in the name of the city assignable certificates in evidence of assessments levied declaring the lien upon the property and the liability of the true owner or owners thereof whether correctly named or not and to fix the terms and conditions of such certificates.

* * * * * * * * *

No lien on property exempt; personal liability of owner; enforcing lien

Sec. 8. Nothing herein shall empower any city, or its governing body, to fix a lien against any interest in property exempt, at the time the improvements are ordered, from the

lien of special assessment for street improvements, but the owner or owners of such property shall nevertheless be personally liable for any assessment in connection with such property: The fact that any improvement, though ordered, is omitted in front of property, any interest in which is so exempt, shall not invalidate the lien or liability of assessments made against other property.

The lien created against any property and the personal liability of the owner or owners thereof may be enforced by suit in any court having jurisdiction, or by sale of the property assessed in the same manner as may be provided by law or charter in force in the particular city for sale of property for ad valorem city taxes.

* * * * * * * * *

Notice and hearing; contents of notice

Sec. 9. No assessment herein provided for shall be made against any abutting property or its owners, nor against any railway, street railway or interurban, or owner, until after notice and opportunity for hearing as herein provided, and no assessment shall be made against any abutting property or owners thereof in excess of the special benefits of such property, and its owners in the enhanced value thereof by means of such improvements as determined at such hearing. Such notice shall be by advertisement inserted at least three (3) times in some newspaper published in the city where such special assessment tax is to be imposed, if there be such a paper; if not, then the nearest to such city of general circulation in the county in which such city is located; the first publication of such notice of hearing to be made at least twenty-one (21) days before the date of the hearing; and, additional written notice of the hearing shall be given by depositing in the United States mail, at least fourteen (14) days before the date of the hearing, written notice of such hearing, postage prepaid, in an envelope addressed to the owners of the respective properties abutting such highway, highways or portion or portions thereof to be improved, as the names of such owners are shown on the then current rendered tax rolls of such city and at the

addresses so shown, or if the names of such respective owners do not appear on such rendered tax rolls, then addressed to such owners as their names are shown on the current unrendered rolls of the city at the addresses shown thereon; and, where a special tax is proposed to be levied against any railway or street railway using, occupying or crossing any highway, portion or portions thereof to be improved, such additional notice shall be given by depositing in the United States mail, at least fourteen (14) days before the date of the hearing, a written notice of such hearing, postage prepaid, in an envelope addressed to the said railway or street railway as shown on the then current rendered tax rolls of such city, at the address so shown, or, if the name of such respective railways do not appear on such rendered rolls of the city, then addressed to such railways or street railways as the names are shown on the current unrendered rolls of the city, at the addresses shown thereon. If any such notice shall describe in general terms the nature of the improvements for which assessments are proposed to be levied and to which such notice relates, shall state the highway, highways, portion or portions thereof to be improved, shall state the estimated amount or amounts per front foot proposed to be assessed against the owner or owners of abutting property and such property on each highway or portion with reference to which hearing mentioned in the notice is to be held, and shall state the estimated total cost of the improvements on each such highway, portion or portions thereof, and, if the improvements are to be constructed in any part of the area between and under rails and tracks, double tracks, turnouts, and switches, and two (2) feet on each side thereof of any railway, street railway or interurban, shall also state the amount proposed to be assessed therefor, and shall state the time and place at which such hearing shall be held, then such notice shall be sufficient, valid and binding upon all owning or claiming such abutting property, or any interest therein, and upon all owning or claiming such railway, street railway, or interurban, or any interest therein. The notice to be mailed may consist of a copy of the published notice. In those cases in which an owner of property abutting a highway or portion thereof which is to be improved is listed as

"unknown" on the then current city tax roll, or the name of an owner is shown on the city tax roll but no address for such owner is shown, no notice need be mailed. In those cases where the owner is shown to be an estate, the mailed notice may be addressed to such estate. Such hearing shall be by and before the governing body of such city and all owning any such abutting property, or any interest therein, and all owning any such railway, street railway or interurban, or any interest therein, shall have the right, at such hearing, to be heard on any matter as to which hearing is a constitutional prerequisite to the validity of any assessment authorized by this Act, and to contest the amounts of the proposed assessments, the lien and liability thereof, the special benefits to the abutting property and owners thereof by means of the improvements for which assessments are to be levied, the accuracy, sufficienty, regularity and validity of the proceedings and contract in connection with such improvements and proposed assessments, and the governing body shall have power to correct any errors, inaccuracies, irregularities, and invalidities, and to supply any deficiencies, and to determine the amounts of assessments and all other matters necessary, and by ordinance to close such hearing and levy such assessments before, during or after the construction of such improvements, but no part of any assessment shall be made to mature prior to acceptance by the city of the improvements for which assessment is levied.

Anyone owning or claiming any property assessed, or any interest therein, or any railway, street railway, or interurban assessed, or any interest therein, who shall desire to contest any such assessment on account of the amount thereof, or any inaccuracy, irregularity, invalidity, or insufficiency of the proceedings or contract with reference thereto, or with reference to such improvements, or on account of any matter or thing not in the discretion of the governing body, shall have the right to appeal therefrom and from such hearing by instituting suit for that purpose in any court having jurisdiction, within fifteen (15) days from the time such assessment is levied, and anyone who shall fail to institute such suit within such time shall be held to have waived every matter

which might have been taken advantage of at such hearing, and shall be barred and estopped from in any manner contesting or questioning such assessment, the amount, accuracy, validity, regularity, and sufficiency thereof, and of the proceedings and contract with reference thereto and with reference to such improvement for or on account of any matter whatsoever. And the only defense to any such assessment in any suit to enforce the same shall be that the notice of hearing was not mailed as required or was not published or did not contain the substance of one or more of the requisites therefor herein prescribed, or that the assessments exceed the amount of the estimate, and no words or acts of any officer or employee of the city, or member of any governing body shown in its written proceedings and records shall in any way affect the force and effect of the provisions of this Act.

Sec. 9 amended by Acts 1967, 60th Leg., p. 365, ch. 176, § 1, eff. May 12, 1967.

* * * * * * * * *

APPENDIX F

F-1

No. C-5800

IN THE SUPREME COURT
OF TEXAS

CITY OF ARLINGTON, TEXAS,
Petitioner,

vs.

LESTER M. BYRD, ET AL,
Respondents.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given by the CITY OF ARLINGTON, TEXAS, Petitioner in the above-styled and number cause, of an appeal to the Supreme Court of the United States from the Final Order of the Supreme Court of Texas dated January 28, 1987, overruling Petitioner's Motion For Rehearing on the Application For Writ of Error in the above-styled cause.

This appeal is taken pursuant to 28 U.S.C. § 1257(3).

Respectfully submitted,

JAY DOEGEY, City Attorney
State Bar No. 05942600
JOHN C. STEWART,
Assistant City Attorney
State Bar No. 19211525

By JAY B. DOEGEY
Jay B. Doegey
City of Arlington, Texas
Post Office Box 231
Arlington, Texas 76010
(817) 459-6878
Attorneys for Petitioner
City of Arlington, Texas

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES has been mailed by certified mail, return receipt requested, on this the 23rd day of April, 1987, to Mr. William R. Brown, 715-B Ryan Plaza Drive, Arlington, Texas 76011, and Mr. Toby R. Goodman, 2005 East Lamar Boulevard, Suite 100, Arlington, Texas 76006, Attorneys for Respondents, and by regular mail to Ms. Yvonne, Palmer, Clerk, Second Supreme District Court of Appeals, Tarrant County Courthouse, Fort Worth, Texas 76196.

JAY B. DOEGEY

JAY B. DOEGEY

No. 86-1732

In The

Supreme Court of the United States

October Term, 1986

CITY OF ARLINGTON, TEXAS,

Petitioner,

v.

LESTER M. BYRD, *ET AL,*

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

RESPONDENTS' BRIEF IN OPPOSITION

COUNSEL OF RECORD:

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or call collect (402) 342-2831

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No. 86-1732

In The

Supreme Court of the United States

October Term, 1986

CITY OF ARLINGTON, TEXAS,

Petitioner,

v.

LESTER M. BYRD, *ET AL,*

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Lester M. and Wanda J. Byrd; Abram H. and Sandra L. Clark; Homer and Mary Ellis; James and Imogene Hayes; Walter S. Holtzclaw; Joel and Barbara Laxson; E.E. and Lois Rawdon; Elizabeth Sandlin; G.R. and Dovie Stephens; John Sullivan; Virgil E. and Betty S. Waldrop respectfully request that this Court deny the Petition for Writ of Certiorari to the Supreme Court of The State of Texas for the reasons stated below.

STATEMENT OF THE CASE

Petitioner's Statement of the Case contains significant errors and omissions in the following particulars:

(1) The ordinance enacted by the Petitioner, City of Arlington, Number 84-27, levied assessments for paving costs against Respondents and fixed a charge and lien against their property.

(2) Respondents filed suit in the 141st District Court of Tarrant County, Texas, seeking to declare the assessments null and void, alleging a cause of action under TEX. REV. CIV. STAT. ANN. art. 1105b and under 42 U.S.C. § 1981, 1982, 1983, 1985, 1986 and pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, and TEX. CONST. art. I, § 17, among other provisions, and seeking reasonable and necessary attorney's fees. Petitioner filed no special exceptions or made any other objection to Respondents' pleadings in the trial court.

(3) Subsequent to signing the Judgment, the trial court issued Findings of Fact and Conclusions of Law in support of its judgment. Included were the following Conclusions of Law:

> CONCLUSION OF LAW NO. 2: "An assessment against the property and its owner for paving improvements in an amount greater than the benefit conferred violated TEX. CONST. art. I, § 17, and the Fifth and Fourteenth Amendments of the United States Constitution and amounts to a taking of private property for public use without just compensation."
>
> CONCLUSION OF LAW NO. 9: "There was no evidence presented to the Arlington City Council as to special benefits accruing to Plaintiffs or their prop-

erties at the public hearing held on November 22, 1983."

CONCLUSION OF LAW NO. 11: "Plaintiffs and their properties received no special benefits as a result of the improvement of Pleasant Ridge Road between Little Road and Kelly Elliot Road."

CONCLUSION OF LAW NO. 19: "The levy of special assessments and the filing of liens against Plaintiffs and their properties deprived Plaintiffs of significant property interest without due process of law."

CONCLUSION OF LAW NO. 20: "Plaintiffs are entitled to reasonable attorney's fees unless special circumstances would render the award of fees unjust."

CONCLUSION OF LAW NO. 22: "No evidence was presented that would show or establish that the award of attorney's fees would be unjust."

(4) Petitioner's Statement of the Case mischaracterizes the trial court's actions regarding Petitioner's Requested Conclusions of Law. While Petitioner did make the requests described on Page 5 of Petitioner's Statement of the Case, the trial court did not "refuse" to make any such findings. Rather, the trial court merely did not make such additional requested findings. Petitioner had the right to seek review of such failure to make findings on appeal under Texas Rules of Civil Procedure, but failed to do so.

(5) Petitioner failed to properly object to Respondents' offer of evidence concerning attorney's fees, merely asking the Court for a "running objection", which was not sustained or overruled, and which does not properly preserve error under Texas Appellate Procedures.

(6) The trial court did not "refuse" to identify any theory upon which the award of attorney's fees was predicated. The Conclusions of Law issued by the trial court established the necessary elements to justify award of attorney's fees under 42 U.S.C. § 1988.

(7) The court of appeals' opinion referred only to the wrongful filing of the assessment liens by Petitioner as providing the constitutional basis for an award of attorney's fees, although the trial court's Conclusions of Law clearly found a constitutional violation in the levy of the assessments by Petitioner.

(8) The "ripeness" issue addressed by Petitioner in Question 2 and Reason II was not presented for review by Petitioner in the state courts, but was only presented by an amicus brief, and then only in connection with Petitioner's Application for Writ of Error to the Texas Supreme Court. Such issue was not presented to or addressed by the court of appeals.

———o———

REASONS FOR DENYING THE WRIT

The only portion of the trial court's judgment which Petitioner seeks to have this Court overturn is the award of attorney's fees to Respondents' attorney. Petitioner seeks to accomplish this result by mischaracterizing the case as one essentially involving only the filing of void assessment liens and by attacking the court of appeals' opinion which recognized the filing of the liens as providing constitutional support for the award of attorney's

fees in order to attempt to manufacture some conflict where none exists.

Respondents submit the court of appeals' opinion does not incorrectly state the law, it merely omits the other, perhaps more compelling, constitutional violations which support the trial court's award of attorney's fees. Even if the court of appeals' opinion had contained an incorrect statement of the law, if the judgment is correct, any misstatement by the court of appeals would not warrant certiorari review by this Court. As stated in *Herb v. Pitcairn, et al.*, 324 U.S. 117, 125, 126 (1945):

> "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to review opinions."

As stated by Petitioner in the Statement of the Case, the Texas Supreme Court denied Petitioner's Application for Writ of Error with the notation "Refused. No Reversible Error". According to Rule 133 of the Texas Rules of Appellate Procedure, such notation is used by the Texas Supreme Court when that court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal. Accordingly, while the court of appeals' opinion may be a decision of the State's highest court for technical jurisdictional purposes, it certainly does not make the court of appeals' opinion a "decision of the Supreme Court of Texas". Petitioner's statements such as "The decision of the Supreme Court is in conflict [sic] the decision of this Court" are misleading at best, and at worse smack of an

attempt to attach more import to this case than is appropriate. An analysis of the questions presented and Petitioner's claimed reasons will show the true nature of the case.

42 U.S.C. § 1988 permits the award of attorney's fees to the prevailing party in any action or proceeding to enforce a provision of 42 U.S.C. § 1983, and 42 U.S.C. § 1983 provides, in part, that every person who, under color of state law, causes another to be deprived of any rights, privileges or immunities secured by the Constitution shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. Therefore, the threshold question in this case is whether there existed a constitutional deprivation by the City of Arlington which gave rise to a proper proceeding for redress, which supports the award of attorney's fees. Petitioner would have this Court grant Writ of Certiorari and find no such constitutional deprivation occurred. In connection with this attempt to avoid paying attorney's fees, Petitioner offers three questions for consideration.

Petitioner's first question is: "Does the filing of a lien pursuant to a state paving assessment statute constitute a 'taking' within the meaning of the Fifth Amendment to the Constitution of the United States?" This question misses the point of the nature of the case and of Petitioner's own claimed conflict. The district court opinion in *Spielman-Fond, Inc. v. Hanson's, Inc.*, 379 F.Supp. 997 (D.C.D.—Ariz. 1973) aff'd, 417 U.S. 901 (1974) analyzed a claim of "taking" of a significant property interest under the Due Process Clause of the Fourteenth Amendment, not a Fifth Amendment taking. As will be

discussed, the filing of the assessment liens in connection with the levy of the assessments made without substantial evidence of special benefit did constitute a violation of Respondents' due process rights.

Petitioner's second question is "May a property owner be awarded attorney's fees pursuant to a 42 U.S.C. § 1983 cause of action when the owner has not attempted to obtain just compensation for an alleged 'taking' through available state remedies?" This question again confuses the constitutional violation which occurred, characterizing this case as a Fifth Amendment "taking" case which might in some cases require a suit for inverse condemnation before a taking would occur. The discussion that follows will show a due process violation occurred when Petitioner enacted the void assessment ordinance and filed the liens. Attorney's fees were properly awardable in the proper proceeding for redress of such violation filed by Respondents in state court, resulting in the judgment in this case.

Petitioner's final question is "May a property owner, who has prevailed solely on a state claim, allege a 42 U.S.C. § 1983 cause of action solely to support an award of attorney's fees pursuant to 42 U.S.C. § 1988?" This question grossly misstates the result obtained at trial and the trial court's rationale therefore, and presents a conclusory statement as to why Respondents alleged a 42 U.S.C. § 1983 cause of action. These assumptions and conclusions are not supported by the record and do not present a substantial federal question for this Court to consider.

Each of these questions is incorporated in one of Petitioner's three reasons for granting writ. The dis-

cussion that follows will show that Petitioner's proffered reasons do not withstand careful examination and that the questions presented need not be reviewed by this Court.

I.

No Conflict With Spielman-Fond

There is no conflict between the court of appeals' opinion in this case and the decision in Spielman-Fond, supra, or the several state and federal court decisions following Spielman-Fond, supra.

For purposes of this discussion, Respondents will assume, arguendo, that *Spielman-Fond,* supra, is entitled to the precedential weight attributed to it by Petitioner. *Spielman-Fond,* supra, held that the *mere filing* of a mechanic's lien by a private contractor claimant in the county deed records did not amount to a "taking" of a significant property interest sufficient to require prior notice and opportunity for a hearing in order to comply with the due process requirements of the Fourteenth Amendment to the United States Constitution.

In the instant case, the court of appeals did not find that filing of the liens was unconstitutional because notice and hearing was not had before the filing. What the court of appeals' opinion did state was that the assessment liens filed constituted a taking without just compensation, which was a violation of the United States Constitution sufficient to justify the award of attorney's fees under 42 U.S.C. § 1988.

The assessments were levied and the liens filed *after* a public hearing of sorts. However, at the public hearing, no substantial evidence was presented to the Arlington City Council as to *special benefits accruing to Respon-*

dents. (Conclusion of Law No. 9, Court of Appeals Opinion, p.C-5 in Petition for Writ.) Therefore, as the trial court's judgment indicates, the assessment ordinance, which supported the special assessments and the assessment liens, was null and void.

The trial court's judgment follows directly *Village of Norwood v. Baker,* 172 U.S. 269 (1898) which held that an assessment ordinance was void when no determination of the value of special benefits was made. In *Village of Norwood, supra,* this Court based its holding on the due process requirements of the Fourteenth Amendment to the United States Constitution stating that the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without just compensation. While this Court in *Village of Norwood,* supra, spoke in terms of "taking" and "just compensation" the case clearly stands for the proposition that assessment without consideration of special benefit violates the Due Process Clause of the Fourteenth Amendment. The "taking" without just compensation in the instant case and in *Village of Norwood,* supra, occurred *when the assessments were made.* The constitutional violation occurred *when the assessments were made.* Certainly this ruling does not conflict with *Spielman-Fond,* supra. The taking which was the constitutional violation was more than the "mere filing" of a lien, it was the assessment *and* subsequent filing of liens. It is true that the assessment ordinance violated the Constitution even if the liens had not been filed. (As a matter of interest, it is

also true that the filing of the liens against homesteads violated the Texas Constitution even if the assessment ordinance had been valid.) It is also true that the liens were not released until the Friday before the trial began on Monday, after significant discovery and pre-trial briefing. This fact alone makes it clear this case involved more than the "mere filing" of a lien. To characterize the judgment and the court of appeals' opinion as improperly finding a constitutional violation by the "mere filing" of lien is such a mischaracterization as to be patently misleading.

The court of appeals may have more completely stated that the assessment ordinance levying the assessments and affixing the liens, which were then filed of record, violated Respondents' rights of due process. However, the court of appeals was correct in its statement that the assessment liens filed by the City *in this case* constituted a taking without just compensation in violation of Respondents' constitutional rights, and that such constitutional violation provides a basis for the award of attorney's fees under 42 U.S.C. § 1988.

Therefore, the court of appeals' opinion in this case presents no real conflict with *Spielman-Fond,* supra. Moreover, it reaches the correct result and presents no questions for review.

Respondents have reviewed all the other federal and state court cases cited by Petitioner to support its alleged conflict. All those cases, save two, were mechanic's lien cases where prior notice and hearing were held not necessary to comply with the due process requirements of the Fourteenth Amendment. Of the other two, one was an

attorney's lien case where prior notice and hearing was held not necessary, and one involved liens for sewer connection and service charges. None involved the assessment issue presented by the instant case. Therefore, the conflict claimed by Petitioner in Reason I simply does not exist.

II.

No Conflict With The Williamson County Regional Planning Commission Case

Petitioner's second reason to grant writ relies on the recent case of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 87 L.Ed.2d 126, 105 S.Ct. 3108 (1985). Petitioner claims that, under *Williamson County,* supra, before Respondents could file a 42 U.S.C. § 1983 cause of action and recover attorney's fees for such action, Respondents must have first filed an inverse condemnation suit under the Texas Constitution, and that until a result in such a suit is obtained, no "taking" has occurred. This argument is preposterous. As discussed previously, the constitutional violation occurred in this case when the assessment ordinance creating the assessments and affixing the liens was enacted without consideration of special benefits, in violation of the Due Process Clause of the Fourteenth Amendment. The "proper proceeding for redress" for Respondents was, then, the lawsuit they filed, in State Court, alleging an improper assessment under TEX. REV. CIV. STAT. ANN. art. 1105b and the constitutional claims under 42 U.S.C. § 1983. The available remedy realized by Respondents was the declaration that the ordinance and assessments and liens created thereby, were null and void. An

inverse condemnation suit is simply *not* an available remedy. Even Petitioner recognizes that the inverse condemnation suit allowed by TEX CONST. art. I, § 17, is available to property owners alleging a governmental land use *regulatory* taking. Paving assessments are not the same as a "regulatory taking". The only "procedure" available under TEX. CONST. art. I, § 17, is a suit for inverse condemnation. It is not really a "procedure" but merely an available remedy judicially implied in certain cases where regulatory land use restrictions have effected a taking of property. Such a remedy would have no applicability in this assessment case. Moreover, the trial court already found that the assessments and liens constituted a taking under TEX. CONST. art. I, § 17. Therefore, an additional suit pursuant to that provision would have been unnecessary.

The holding in *Village of Norwood, supra,* makes it clear that in such a case as this, where the assessment was an illegal one, the only appropriate remedy is a decree enjoining the whole assessment. 172 U.S. at 291. The state action which constituted the due process "taking" in this case and in *Village of Norwood,* supra, was *already complete* when the void assessment ordinance was enacted. It is different from the Fifth Amendment "taking" discussed in *Williamson County,* supra, where this Court found that a reasonable and adequate provision exists for obtaining compensation, and the state's action is not complete until the state fails to provide adequate compensation for the taking. In *Williamson County,* supra, the Plaintiff filed suit in Federal Court under 42 U.S.C. § 1983, claiming that various zoning laws and regulations amounted to a Fifth

Amendment "taking" without just compensation. This Court held that the 42 U.S.C. § 1983 suit was premature because there had been no final decision by the governmental entity charged with implementing the regulations concerning the applicability of the regulations to the property, and because Plaintiff had not utilized the state procedures for inverse condemnation. 87 L.Ed.2d at 143, 145. Moreover, in *Williamson County,* supra, this Court *did not hold* that if Plaintiff had obtained a final decision by the appropriate governmental entity and had filed suit under Tennessee inverse condemnation laws, joining with such suit a 42 U.S.C. § 1983 claim, Plaintiff would not have been entitled to recover under 42 U.S.C. § 1988 if he prevailed, for the attorney's fees incurred in such suit. See *North Carolina Department of Transportation, et al v. Crest Street Community Council, Inc., et al,* No. 85-767 (1986). In fact, *Williamson County,* supra, did not even address attorney's fees.

In the instant case, the void assessment was an illegal government action that had the same affect as a "taking", constituting an invalid exercise of the police power, in violation of the Due Process Clause of the Fourteenth Amendment. Respondents filed suit in state district court to enforce their constitutional rights to due process of law, seeking the proper remedy (declaration that the ordinance establishing assessments and liens was void), in the "proper proceeding for redress". Attorney's fees were properly awarded. For this reason, and the reasons discussed above, this case is not in conflict with *Williamson County,* supra.

III.

No Conflict With Spencer v. South Carolina Tax Commission

Petitioner's third reason for granting the writ claims that the decision announced by the court of appeals is in conflict with *Spencer v. South Carolina Tax Commission,* 281 S.C. 492, 316 S.E.2d 386 (S.C. 1984) aff'd, 471 U.S. 82 (1985) on an important question of federal law.

Respondents fail to see either a conflict or an important question of federal law. In *Spencer,* supra, the South Carolina Supreme Court upheld the trial court's denial of attorney's fees in a challenge of a state tax statute stating that it could be reasonably inferred that the sole reason the taxpayer alleged 42 U.S.C. § 1983 was to justify allowance of counsel fees. No discussion of the pleadings or the parties' actions concerning same was provided to amplify or explain the rationale of this statement. In the instant case, as stated in the court of appeals' opinion, no special exceptions were filed by Petitioner challenging the pleadings. The trial court issued Conclusions of Law which expressly found that Respondents were entitled to attorney's fees and that no evidence was presented that would show or establish that the award of attorney's fees would be unjust. (Conclusions of Law 20, 21, 22 and 23.) Based on these facts, Petitioner cannot claim, except perhaps with tongue in cheek, that "it can be reasonably inferred that 42 U.S.C. § 1983 was alleged merely to support the award of attorney's fees." There *was* proof in the trial court of a violation by Petitioner of Respondents' due process rights, and unassailed Conclusions of Law to that effect.

Congress' purpose in enacting 42 U.S.C. § 1988 was to ensure effective access to the judicial process for persons with civil rights grievances. Congress intended that a prevailing Plaintiff should ordinarily recover attorney's fees unless special circumstances would render such an award unjust. See *Hensley v. Eckerhart,* 461 U.S. 424 (1983). 42 U.S.C. § 1988 provides that the Court *may* award attorney's fees. The trial court in the instant case *in its discretion* awarded Respondents attorney's fees. Merely because the South Carolina trial court chose *in its discretion* not to award attorney's fees, does not, in any manner, create a conflict between the legal principals utilized by the two decisions.

Petitioner's reliance on *Parratt v. Taylor,* 451 U.S. 527 (1981) for support is misplaced. Clearly in that case the deprivation occurred as the result of an unauthorized random act, not out of an established governmental procedure or policy. This Court recognized that distinction in *Williamson County,* supra. 87 L.Ed.2d at 145.

Contrary to Petitioner's statement, Tex. Rev. Civ. Staf. Ann. art. 1105b was not an exclusive remedy. Petitioner cannot be claiming that the Supremacy Clause of the United States Constitution is not operative in this case. Respondents certainly had the right to bring a 42 U.S.C. § 1983 cause of action in conjunction with the state statutory claim, both of which were based on the same operative facts, an assessment *not* based on evidence of special benefits. It is clear that under Texas law the analysis under Tex. Rev. Civ. Stat. Ann. art. 1105b begins with a constitutional analysis of special benefit. See *Haynes v. City of Abilene,* 659 S.W.2d 638, 641 (Tex. 1983) citing *Village of*

Norwood, supra. Accordingly, Petitioner's claim of an exclusive state remedy fails.

Therefore, Petitioner's attempt to manufacture a conflict with *Spencer,* supra, cannot withstand examination, and cannot justify this Court's grant of Writ of Certiorari.

CONCLUSION

This case does not present a conflict with any important question of federal law. Attorney's fees were awarded by the trial court in connection with judgment that a paving assessment ordinance and the liens filed pursuant thereto were void, issuing Findings of Fact and Conclusions of Law in support of the judgment. Those conclusions show that the assessment ordinance was enacted without a valid determination of special benefits, in contravention of Respondents' right to due process of law under the Fourteenth Amendment to the United States Constitution. This illegal assessment and the liens filed pursuant thereto caused Respondents to file a proper proceeding for redress to enforce their constitutional rights for which proceeding attorney's fees were properly awarded. The Fourteenth Amendment "taking" occurred, and the state action was complete when the assessment ordinance was passed.

There is no conflict, then, with *Spielman-Fond,* supra, with *Williamson County,* supra, or with *Spencer,* supra. Petitioner has not presented any substantial question of

federal law for consideration by this Court, and the Writ of Certiorari should be denied.

Respectfully submitted,

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